The Constitution in the Supreme Court: The First Hundred Years, 1789–1888. By David P. Currie. (Chicago: The University of Chicago Press, 1986. 504 pp. Indexed. $55.00.)

In the introduction to this book, Professor Currie succinctly states his intention: "My aim is to provide a critical history, analyzing from a lawyer's standpoint the entire constitutional work of the Court's first hundred years. My search is for methods of constitutional analysis, for techniques of opinion writing, for the quality of the performances of the Court and of its members."

It is a formidable challenge to read every Supreme Court decision involving constitutional issues between 1789 and 1888. It is an impressive intellectual accomplishment to analyze the performance of every justice who wrote an opinion in those cases. To analyze critically over one hundred and forty cases with clarity and convincing logic while summarizing all the remaining constitutional decisions of the period in the notes is extraordinary. To do this in 452 pages of text, excluding appendices and indexes, is a minor miracle. Yet that is just what Professor Currie has done.

In order to accomplish this remarkable feat, Currie had to keep his focus narrow. Every justice who sat on the court between 1789 and 1888 is critiqued individually, but the judges are reduced to their opinions. Those opinions are analyzed in terms of legal craftsmanship rather than placed in the context of the history of their time. The political struggle between Jefferson and the Federalists that provides the background for *Marbury v. Madison* is buried in the notes. Currie does not even mention the financial shenanigans of the officers of the Second Bank of the United States in Baltimore that gave poignancy to the arguments of Maryland in *McCulloch v. Maryland* that the bank was a private institution. He is not interested in discussing in this book why decisions turned out the way that they did, or even what effect those decisions had upon society. His quest is for the technical competence of the opinions written to justify the decisions.

The standards Currie applies are simple. "Since the Constitution is law, the judges have no right to ignore constitutional limitations with which they disagree. . . . Beyond this, I share the conventional views that judges have an obligation to explain the reasons for their decisions as concisely and persuasively as practicable and that they should strive for consistency, reserving the right to correct egregious and important errors on relatively rare occasions." Judged by these criteria, there are very few flawless constitutional opinions in the first century of the court's existence (or, for that matter, in its second century).

The book begins with the frequently overlooked decisions of the court before John Marshall became Chief Justice. That Court invalidated a state law, engaged in judicial review of federal legislation, established principles of construction of constitutional issues and fleshed out the jurisdictional framework of the federal court system. Currie uncovers the early pension cases cited by Marshall in *Marbury v. Madison,* including decisions never published by the Court, and examines their impact on the role of the Court.

After restoring the early work of the Court to its proper claim on our attention, Currie discusses the decisions of the Court under John Marshall. Those decisions have been extremely influential in shaping our nation. Marshall gave federal powers a generous construction, and the Court under Marshall acted vigorously in applying constitutional limits to the states. But while Currie gives Marshall's genius its due, he also takes Marshall to task for inconsistency, for ignoring opposing arguments, and for overreaching. On the crucial issues for decision, Marshall tended to be too conclusory to suit Professor Currie. "In short, though Marshall has been generally admired, it is difficult to find a single Marshall opinion that puts together the relevant legal arguments in a convincing way."

Taney lacked Marshall's statesmanship and wrote a disastrous opinion in *Dred Scott.* Nevertheless, Currie writes that Taney at his best was not only clear but also extremely persuasive. Taney's opinion in *The Genesee Chief,* extending the admiralty jurisdiction of the federal courts beyond tidewaters to the Great Lakes, earns Currie's praise as an impressive achievement. But Taney had formidable intellectual rivals on the court, notably Justices Story and Curtis. Currie praises Story for his dissent in *The Charles River Bridge Case,* although most modern critics are more likely to agree with the majority in limiting the impact of the contract clause on contracts made by the state. Justice Curtis gathers laurels from Currie for statesmanship in interpreting the commerce clause, but only his dissent in *Dred Scott* receives unconditional praise.

Justice Miller emerges as the star of the Supreme Court under both Chief Justices Chase and Waite. But praise for Miller's "exemplary

clarity and brevity" does not distract Currie from criticism of "a strong judge with unusually great abilities and little respect for the law."

Currie does not take issue with the substantive outcome of many of the court's decisions in the first hundred years. Even where he believes that an important decision distorted the Constitution, he states that most of the time the decision was fairly debatable. His fundamental critique is of craftsmanship and not of result. The criticism may be warranted, but it is surely only a partial view of the behavior of the Court.

Currie's list of great justices is short: Marshall, Story, Taney, Curtis and Miller. He also notes the shortcomings of even the chosen few, castigating the invalidation of the Missouri Compromise by Taney and others in *Dred Scott v. Sandford* as the worst decision ever written. Currie acknowledges that "from the smug advantage of a century or two of hindsight, it is easier to find fault than to write a good opinion; an attempt to rewrite *Marbury v. Madison* is sobering even today." He selects Curtis's dissent in *Dred Scott* as "the supreme monument of the lawyer's craft in the first century of constitutional adjudication." A closer look at that opinion, however, suggests that even Currie may not be critical enough. Curtis's conclusion that the citizenship of a free black depends on the status given free blacks by the state of the individual's birth, regardless of where the individual resides or where he achieved freedom is not thoroughly explained in the opinion. It produces weird anomalies—the free black residing in a state that regards free blacks as citizens would still not be a citizen of the United States or of that state if the state of his birth did not consider free blacks to be citizens. A national citizenship based on birth and free status would seem to be a more plausible decision.

The book is adapted from a series of articles in law reviews. It follows law review format with footnotes at the bottom of each page. Thus, some pages have only a few lines of text while the rest of the page is footnotes. The format, however, is wise. It enables the reader to follow the details of arguments in each case and later doctrinal developments without having to flip back and forth from one part of the book to another.

In general, Currie gives a precise and accurate rendition of the decisions of the court. However, there is at least one notable blooper. He castigates Chief Justice Chase for dissenting in *Bradwell v. Illinois,* noting that it was impossible to see why Chase had dissented because Chase "had agreed with Slaughterhouses narrow interpretation of the only clause relied on." In fact, Justice Field, expounding a broad interpretation of the privileges and immunities clause, stated in *The Slaughterhouse Cases* that Chief Justice Chase concurred with his dissent.

Such lapses by Currie are rare. This book discusses virtually every constitutional decision of the Supreme Court in its first century, giving a technical critique of all of the important cases. The writing is clear. Given the scope of the project, it is a model of brevity. Judged by his own criteria of explaining the reasoning of decisions as concisely and persuasively as practicable, Currie has done a superb job.

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